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3 **BEFORE THE INSURANCE COMMISISONER**
4 **OF THE STATE OF WASHINGTON**

5 In the Matter of the Application
6 regarding the Conversion and
7 Acquisition of Control of Premera Blue
8 Cross and its Affiliates

Docket No. G02-45

SEVENTH ORDER: APPOINTMENT
OF SPECIAL MASTER

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10 **Appointment of Special Master**

11 In compliance with the Fourth Order, which I issued on February 10, 2003, the OIC
12 Staff, Premera, and the five Intervener Groups (collectively referred to as the "Parties") filed a
13 Joint Proposal regarding Discovery and Hearing Schedule ("Joint Proposal"). The Parties
14 jointly proposed that I appoint a Special Master to handle discovery disputes that may arise
15 prior to the adjudicative hearing in this case. The names of three candidates, which are
16 acceptable to all Parties, were submitted to me. I am appointing one of those candidates,
17 Judge George Finkle, as a Special Deputy Commissioner to act as a Special Master for
18 discovery matters in this case. Judge Finkle is associated with Judicial Dispute Resolution
19 LLC. His mailing address is 1411 Fourth Avenue, Suite 200, Seattle WA 98101. His
20 telephone number is (206) 223-1669, and the fax number is (206) 223-0450.

21 **Process for Taking a Discovery Dispute to the Special Master**

22 The Parties proposed procedures for presenting a dispute to the Special Master, which
23 I have adopted for the most part, as follows:

24 1. Except as provided in paragraph 5 of these procedures, if any of the Parties has
25 a dispute regarding any discovery matter (for example, whether a response to a document
26 request is sufficient or whether a document should be deemed protected from disclosure), the
dispute shall be presented to the Special Master in writing.

1 2. In regard to any disputes over document production or producing a witness for
2 a deposition, the party resisting the request shall state the basis of its objections with
3 specificity within 15 days after the receipt of the request. The party seeking production shall
4 file with the Special Master its motion and supporting brief to compel production within 7
5 business days from the date of receipt of the objection. The party objecting to the request shall
6 have 7 business days to file its response and supporting brief.

7 3. Any party may request oral argument. If the Special Master determines that
8 oral argument would be beneficial, the Special Master will arrange for a prompt telephonic or
9 in-person conference. The Special Master shall notify the Commissioner of the date and time
10 of the oral argument by contacting Carol Sureau, Deputy Commissioner for Legal Affairs.
11 The Special Master will decide the dispute as soon possible and will promptly issue a written
12 decision, preferably within 5 business days.

13 4. If any party wishes to challenge the decision of the Special Master, a motion
14 seeking the Commissioner's review, along with any supplemental briefing, must be submitted
15 to the Commissioner within 5 days of receipt of the Special Master's decision. Any opposing
16 party has 5 days to file a response. A party may request oral argument. If the Commissioner
17 determines that oral argument would be beneficial, a prompt telephonic or in-person
18 conference will be held. The Commissioner will issue a decision affirming, reversing, or
19 modifying the decision of the Special Master.

20 5. The Special Master is also authorized to resolve discovery scheduling disputes
21 (for example, dates of depositions) or disputes that may arise during the course of a deposition
22 (for example, refusal of a deponent to answer a question). The Special Master may decide
23 these issues without briefing and via a telephone conference. A party may ask the
24 Commissioner to review the Special Master's decision pursuant to paragraph 4 of these
25 procedures.

1 6. If, as a result of a discovery dispute, a party desires an extension of a deadline
2 that is established in a Scheduling Order issued by the Commissioner, the Special Master may
3 hear the request and make a recommendation to the Commissioner. However, no extension
4 may be granted without the approval of the Commissioner.¹

5 7. The original and copies of all filings, including letters and pleadings, submitted
6 to the Special Master shall be filed and served in accordance with the requirements set forth in
7 the First Order: Case Management Order, as amended in the Fifth Order. The Special
8 Master's copy of all documents relevant to the discovery dispute shall be served on him
9 directly. An original plus 5 copies (including one electronic copy) of any written decision or
10 correspondence issued by the Special Master shall be submitted by him to Carol Sureau,
11 Deputy Commissioner for Legal Affairs, in addition to being served on the Parties' lead
12 attorneys. The purpose of these service requirements is to ensure that the administrative
13 record is complete and that all public documents are available to be posted on the website of
14 the Office of the Insurance Commissioner.

15 8. The purposes of appointing a Special Master are twofold: (1) to obtain for the
16 Parties and the Commissioner the benefit of the expertise of a judge experienced in dealing
17 with discovery matters; and (2) to promote prompt decisionmaking by having an arbiter
18 readily available to resolve any disputes. Consistent with these purposes, the Special Master
19 and the Commissioner, or his advisors if the Commissioner so delegates, may consult with
20 each other at any time, including during the course of a discovery dispute.

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23 ¹ There are other matters relating to discovery and the hearing schedule that are
24 discussed in the Parties' Joint Proposal, but not yet resolved. These matters include the use of
25 request for admissions, the time period in which discovery must be completed, who may be
26 deposed and the deadlines for taking depositions, and the deadline for filing expert reports and
pre-filed testimony. I may ask the Special Master to make recommendations to me regarding
these issues; however, these issues will be resolved by me in a separate order.

1 **Payment of Costs Associated with the Special Master**

2 In the Joint Proposal, Premera agreed to pay the costs associated with the Special
3 Master on the condition that, if either Premera or the Intervener Groups brought an
4 unsuccessful motion to compel, “the party that did not substantially prevail would have to pay
5 all of the Special Master’s fees and costs attributable to the motion.” Joint Proposal at 4.
6 Based upon argument of the Parties during the status conference held on the Joint Proposal, I
7 understand that “costs” include the prevailing Party’s attorneys’ fees. I have determined that I
8 do not have the statutory authority to award fees and costs to the prevailing party in a
9 discovery dispute. Consequently, I cannot accept the condition requested by Premera.

10 There is no express statutory authority allowing me to assess fees and costs to the
11 losing party in a discovery dispute. Without express authority to impose such a sanction, I am
12 precluded from doing so. *See, e.g., Cohn v. Dept. of Corrections*, 78 Wn. App. 63,895 P.2d
13 857 (1995). Premera has suggested that RCW 48.31C.030(4), which allows participants in the
14 hearing to “conduct discovery proceedings in the same manner as is allowed in the superior
15 court of this state,” gives me by implication the same authority the court has under Civil Rule
16 37 to award fees and costs to the prevailing party in a discovery dispute. I do not believe I can
17 infer such authority from this generic reference. Indeed, the Administrative Procedure Act,
18 which allows the presiding officer to permit the parties to conduct discovery in accordance
19 with the procedures set forth in the superior court civil rules, expressly references only rules
20 26 through 36, excluding rule 37. RCW 34.05.446(3).

21 While I do not expect there to be abuses of the discovery process, there are sanctions
22 that are available to me should abuses occur. For example, I may assess a penalty against a
23 licensee for failing to abide by an order issued in this case. RCW 48.05.140(1) and 48.05.185.
24 Additionally, a Party, who refuses to abide by a discovery order or refuses to cooperate in
25 discovery, could be dismissed from the case, have limits placed on the evidence it may offer
26 at the hearing, or have a negative inference drawn against its position based on the fact

1 discovery has not been made available. Whether any one of these sanctions is appropriate
2 will depend on the specific circumstances.

3 Although Premera's offer to pay the costs of the Special Master was premised upon a
4 condition I cannot accept, I have appointed a Special Master and am requiring Premera to pay
5 his fees. RCW 48.31C.030(5)(b) provides:

6 The commissioner may retain at the acquiring person's expense any attorneys,
7 actuaries, accountants, and other experts not otherwise a part of the
8 commissioner's staff as may be reasonably necessary to assist the
9 commissioner in reviewing the proposed acquisition of control. All reasonable
10 costs of a hearing held under this section, as determined by the commissioner,
including reasonable costs associated with the commissioner's use of
investigatory, professional, and other necessary personnel, mailing of required
notices and other information, and use of equipment or facilities, must be paid
before the issuance of the commissioner's order by the acquiring person.

11 I agree with the Premera and the other Parties that these proceedings will benefit from having
12 a Special Master to handle discovery disputes. I have determined that the cost of a Special
13 Master is included within the reasonable costs of holding the hearing in this matter under the
14 Holding Company Act. On regular intervals, the Special Master will forward his bills to the
15 attention of Carol Sureau, Deputy of Legal Affairs. After review, the bills will be forwarded
16 to Premera for payment. The bills will be paid directly to Judicial Dispute Resolution by
17 Premera within 30 days of receipt by Premera, or within such other time period acceptable to
18 Judicial Dispute Resolution .

19 **Parameters for Considering Discovery Matters**

20 In determining what information and documents are relevant discovery material, the
21 Special Master shall be guided by the evidentiary standards of the Administrative Procedure
22 Act, RCW 34.05.452, and the statutory factors I must consider in reviewing Premera's
23 proposed transaction. The statutory factors are found primarily in RCW 48.31B.015 and
24 48.31C.030 and 050. A summary of the factors are as follows: whether (1) after the
25 acquisition the affiliated companies can each satisfy the requirements for licensure under the
26 Insurance Code; (2) the acquisition may substantially lessen competition or tend to create a

1 monopoly; (3) the financial condition of the acquiring party might jeopardize the financial
2 stability of the insurer, or prejudice the interests of policyholders and subscribers; (4) the
3 future business plans of the acquiring company are unfair and unreasonable to policyholders
4 and subscribers and not in the public interest; (5) the proposed management of the insurer
5 lacks competence, experience, or integrity; or (6) the acquisition is likely to be hazardous or
6 prejudicial to the insurance-buying public. Because the proposed transaction includes the
7 conversion of a nonprofit entity to for-profit and the creation of a foundation to receive certain
8 assets of the nonprofit, the Commissioner also may review the valuation of the company and
9 whether the value is preserved for use in accordance with the law. *See* RCW 24.03.225. *See*
10 *also* Letter from Attorney General Christine Gregoire to Commissioner Mike Kreidler, dated
11 October 15, 2002, regarding respective roles of the Insurance Commissioner and the Attorney
12 General.

13 The Special Master shall also refer for guidance in resolving discovery disputes to my
14 Fourth Order: Ruling on Motions to Intervene. The Fourth Order generally sets forth the
15 scope of intervention and certain conditions and limitations that have been placed on the
16 Intervener Groups.

17 **Referral of Issue regarding Protective Order**

18 The Parties have been working on a protective order to propose to me for adoption.
19 The Parties desire to have a protective order in place prior to the initiation of discovery. I
20 understand that, while the parties have agreed on some provisions of a proposed order, they
21 are not in complete agreement on other provisions. The Parties have informed me that they
22 are prepared to submit their dispute regarding the protective order to the Special Master. By
23 way of this order, I am asking the Special Master to review the dispute and submit to me a
24 recommended protective order for adoption.

1 I also understand that the Parties have been negotiating a separate confidentiality
2 agreement. If the Parties agree, the Special Master may assist in mediating the terms of a
3 confidentiality agreement.

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5 **IT IS SO ORDERED**, this 10th day of April, 2003.

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11 MIKE KREIDLER
12 INSURANCE COMMISSIONER
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